In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-390

HENRY BESSESEN AND BUNI BESSESEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1971. A petition for rehearing was denied on August 19, 1971. The petition for a writ of certiorari was filed on September 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

447-072—71

QUESTIONS PRESENTED

1. Whether petitioners may raise, for the first time in this Court, the claim that their right to a speedy trial was violated by the delay between the commission of the offenses and the date of the indictment.

2. Whether petitioners' rights of confrontation were violated by the admission of allegedly hearsay testimony not objected to at trial.

3. Whether the instructions failed to set forth the theory of the defense.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, Henry Bessesen was convicted on each count of a five count indictment charging mail fraud in violation of 18 U.S.C. 1341 and was sentenced to two consecutive five year sentences. His wife, Buni Bessesen, was found guilty on two counts and was sentenced to one year on one count and placed on five years probation on the other.

The mechanics of petitioners' financial transactions are set forth in detail in the opinion below, the accuracy of which petitioners admits. In brief, the evidence showed that Henry Bessesen managed the Tucson Inn which was owned by Mrs. Leah Rosa Simpson. The fraud consisted of a "check-kiting" scheme in which petitioners deposited over $350,000 in bad checks in various banks located in Tucson, Arizona, and Chicago, Illinois.

Henry Bessesen testified that Mrs. Simpson had purchased the Tucson Inn in 1962 by executing two

$250,000 promissory notes and assuming a $600,000 mortgage and that he was a co-signer of the notes. (Tr. 566, 664). He acknowledged that he knew the funds were insufficient when he wrote the checks. The thrust of his defense was that he reasonably expected Mrs. Simpson to "cover" the checks. (Tr. 571, 653, 655.) He described Mrs. Simpson as a very active and energetic woman with good eyesight who was capable of taking care of herself in business transactions (Tr. 552, 658, 661, 714).

In rebuttal the government called Mr. Haberman, Mrs. Simpson's attorney, who testified that Mrs. Simpson was a frail, elderly blind woman who suffered from memory lapses. He stated that, prior to the signing of the notes, Mrs. Simpson had consulted with him a number of times, usually with Mr. Bessesen present, and that he advised her not to sign any notes (Tr. 771, 784). The following colloquy then occurred (Tr. 787–789):

> (Prosecuting Attorney) Q. Who else was present at that time?
>
> (Mr. Haberman) A. Mr. D'Antonio, Mr. Raymond F. Hayes, another member of our firm, and Mr. Adrian [petitioner] * * *.[1]
>
> Q. Would you please relate the substance of that conversation.
>
> A. We stated to Mr. Adrian that we had heard rumors among real estate circles in town that * * * Mr. Adrian was operating the Tucson Inn and had somehow purchased the stock, and we wanted to know whether or not he had done

[1] Mr. Bessesen had formerly been an actor and often used his stage name, Adrian.

so by getting Mrs. Simpson to co-sign the notes, because we had talked to Mrs. Simpson when we heard these rumors and asked her if she had done it and she said no, and he said yes, that she had co-signed the notes.

Q. In regard to those promissory notes, was that the last you heard of those notes, sir?

A. No, it was not, unfortunately.

Q. When was the next time that those promissory notes were brought to your attention?

A. In August—well, one of them in August of 1965 when she was sued for $287,500 plus interest * * *.

Q. What was your primary defense to that lawsuit?

A. The primary defense was that if she had indeed signed the note at all, her signature on the note was secured by trick, by artifice, by fraud, by misrepresenting the character of the instrument that she signed as a promissory note—not as a promissory note but as something else.

(Defense Counsel) Mr. OLIVER. I object. He is getting into the defense in another lawsuit.

The COURT. Do you have any comment?

(Prosecuting Attorney) Mr. KRAJCIR. Well, your Honor, I think the defendant has made those promissory notes the key to his case, and anything that sheds light on those promissory notes is going to be of assistance to this jury.

The COURT. He may answer * * *.

ARGUMENT

1. Petitioners contend that they were prejudiced by the approximately five year delay between the commission of the offenses in 1963 and the return of the

indictment in 1968. The question whether an indictment may be dismissed because of pre-indictment delay is before this Court in *United States* v. *Marion*, No. 70–19, this Term. However, the resolution of this case need not await that decision since petitioners did not file a motion to dismiss the indictment and, in addition, did not raise this issue below. Thus there is no record upon which this Court can determine whether the delay was reasonable and justified and whether it was prejudicial to the petitioners. For this reason they should not be permitted to raise the issue for the first time in this Court. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. Moreover, since no witnesses were lost and the evidence was preserved in the form of bank records, it appears unlikely that petitioners were prejudiced by the delay.

2. Petitioners at trial never objected at all to testimony by Mrs. Simpson's lawyer concerning his statement to petitioner that Mrs. Simpson denied signing the notes, and objected to his statement of the theory upon which Mrs. Simpson was defending the lawsuit merely on grounds of irrelevance, not hearsay. The relevancy objection was properly overruled as the testimony was clearly relevant to rebut petitioners' defense. The trial judge was not accorded an opportunity to rule on any hearsay claim. In light of this, petitioners may not now raise such a claim. *United States* v. *Indiviglio*, 352 F. 2d 276, 279–280 (C.A. 2); *United States* v. *Turner*, 423 F. 2d 481, 484 (C.A. 7), certiorari denied, 398 U.S. 967.

Moreover, the statement concerning Mrs. Simpson's defense was not hearsay. As Mrs. Simpson's attorney, Mr. Haberman, was testifying on the basis of personal firsthand knowledge of the defense he, himself, had presented on her behalf. This testimony was admissible in rebuttal because it was inconsistent with petitioners' defense of good faith expectation of payment. *United States* v. *Wilson*, 439 F. 2d 1081, 1082 (C.A. 5).

The other reference to Mrs. Simpson—her attorney's testimony that he told petitioner that Mrs. Simpson had denied signing the notes—occurred not as the attorney's reciting an extra-judicial declaration of Mrs. Simpson, but in the course of his recounting a conversation with the petitioner, and was merely a part of the context of petitioner's admission to Mrs. Simpson's lawyer that Mrs. Simpson had in fact signed the notes against her attorney's advice. Moreover, as noted, this passing reference was not objected to at all by defense counsel.

3. Petitioners argue that the court's failure to charge the jury in the language tendered by defense counsel denied him due process of law. Petitioners tendered a lengthy, confusing set of instructions (Tr. 867–870), which included a detailed description of the purported evidence and inferences petitioners drew therefrom. Since much of this charge involved facts in dispute the trial judge properly rejected the charge as argumentative (Tr. Supp. 18). As the courts below held, the trial court's charge adequately covered the points of law and the substance of the requested in-

structions (Pet. App. 12a). The specific instruction concerning intent to defraud (Tr. 911–914) explained all the requisite elements of the offense. See *United States* v. *Broxmeyer,* 192 F. 2d 230, 232–233 (C.A. 2). The court's charge regarding reasonable expectations of payment (Tr. 919) was also more than adequate. See *Deschenes* v. *United States,* 224 F. 2d 688, 692 (C.A. 10). Mrs. Bessesen's defense, that she was under the control and direction of her husband, was fully explained (Tr. 922).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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